Supreme Court, U.S.
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No. 94-915

In The

Supreme Court of the United States

October Term, 1994

NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA; AMERICAN INTERNATIONAL GROUP, INC.; and AMERICAN ADJUSTMENT COMPANY, INC.,

Petitioners,

vs.

HIGHLANDS INSURANCE COMPANY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the Fifth Circuit correct in its determination that under New York law, National Union[1] had the burden of proving the existence of limits on its liability, and that National Union waived its right to a jury determination of this affirmative defense by failing to request a jury instruction?

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1. The three Petitioners are referred to collectively as "National Union".

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Respondent, Highlands Insurance Company, respectfully requests that this Court deny the Petition for Writ of Certiorari because the Fifth Circuit correctly held that the District Court decided controlling fact issues correctly and error, if any, was waived by Petitioners' failure to request or submit jury instructions on the controlling issues.

STATEMENT OF JURISDICTION

The statutes relied on by Petitioners in support of jurisdiction do not support review by this Court of the Fifth Circuit's decision. The opinion does not conflict with any other decision of a United States Court of Appeals and does not deprive Petitioners of due process of law.

STATEMENT OF THE CASE

This case is accurately stated in the Fifth Circuit's opinion (Pet. App. A-1), unanimously rejecting the same arguments Petitioners are attempting to advance to this Court.

One of the critical trial issues was the amount of insurance policy limits applicable to this controversy. National Union's contention, in its pleadings and at trial, was that policy limits of $500,000 rather than the $3,000,000 claimed by Highlands, was the extent of its liability, if any, to Highlands (Pet. App. A-15). Despite their burden of proof on the affirmative defense of policy limits, National Union failed to request or secure a jury instruction. Although Petitioners argue on page 6 of their Statement of the Case, that they argued at trial that "the issue should be resolved by the Court, as a matter of law", they do not reveal that such arguments were first made during closing arguments and only after the jury charge was submitted and argued (Tr. 648).

SUMMARY OF THE ARGUMENT

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. It merely challenges the District Court's determination of fact issues which the Court of Appeals correctly determined were waived. The decision of the Court of Appeals does not conflict with, and indeed, is in accord

with, the decisions of other courts of appeal and this Court. Nor does this case present any significant legal issue which would justify granting a writ of certiorari.

REASONS FOR DENYING THE WRIT

The sequence of events in this case is quite different from that in *Sanders v. Shaw*, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917), an action to enjoin the collection of a drainage tax, upon which Petitioners rely. In that case, the trial court excluded plaintiff's evidence that his land would not benefit from certain drainage improvements. Defendant therefore offered no proof that plaintiff's land would benefit and prevailed at trial on the basis of a directed verdict. The Louisiana Supreme Court reversed the trial court and granted a permanent injunction enjoining the tax and finding that plaintiff's land could not and would not benefit from the tax. This Court reversed the Louisiana Supreme Court to allow the intervening defendant the opportunity to offer and controvert the plaintiff's proof. Here, the Petitioners were given complete opportunity to offer, rebut, examine and cross-examine on the issue of policy limits. Petitioners were not prevented by the District Court from presenting whatever evidence was necessary to their case. This case therefore is not about the Petitioners' inability to present its case because of arbitrary conduct on the part of the court, but rather about whether Petitioners, when given every opportunity to rebut Respondent's case, satisfied their burden of proof so as to challenge the District Court's determination of this factual controversy on appeal. The Fifth Circuit has ruled not only that Petitioners failed to sustain their burden of proof on its affirmative defense of policy limits, but furthermore waived any right to complain of error by their failure to request or submit a proper jury.

At trial, National Union took the position that the amount of policy limits was a matter of contract construction and a question of law for the court (Tr. 648). The part of the record not brought to this Court's attention by appellant demonstrates that Petitioners acquiesced in the court's decision to determine policy limits based on facts and law already in evidence. During closing arguments, after the charge conference and after the jury instructions were given to the jury, Petitioners' counsel attempted to argue policy limits:

> THE COURT: I'm not prepared to construe the contract at this point. I can't possibly do that at this point. I don't know what to do. I'm kind of in a quandary here. I guess I'm going to have to sustain his objection. We'll just have to go this way because I don't know any other way to go.
>
> MR. COOPER: This is very unfair to my clients because of its $500,000, one of the things I want to be able to argue is that they probably would have contributed the entire amount of the $500,000 policy. But if the jury comes back with a million and the Court says it's a $500,000 policy, then as I understand what they're arguing is, you just, you know, apply the $500,000 cap; and that may not have been what the jury would have assessed if they knew there was a $500,000 limit.
>
> THE COURT. I understand your position. I'm wondering if you-all can agree that we were — in other words, if the jury goes above $500,000 — well, no, that won't work either. Let's just go ahead and go with the way he says. Let's go with your not arguing that; and,

depending on what the jury does, after I've looked at the contract, I may have to grant a new trial.

MR. COOPER: Okay.

THE COURT: Because there's no way I can construe the contract now.

MR. WALRAVEN: Your Honor, in that event, could I have an instruction that the policy limits is not something that the jury is to consider?

THE COURT: Yes.

. . .

MR. COOPER: Of course, it puts me now in a situation in front of the jury.

THE COURT: I'll tell them it's not your fault; it's my fault.

MR. COOPER: Okay.

(Conclusion of bench discussion.)

THE COURT: You have a total of approximately 15 minutes left.

Well, just a moment. I need to tell the jury something. Ladies and gentlemen, through no fault of Mr. Cooper, I want you to know that it's my fault but I did make a determination on

> the issue of policy limits. You are not to consider that at all in your deliberations. The policy limits were something that I was to determine, not something for you to determine. So, don't think about how the policy limits might apply when you're deliberating about damages, if you get to the point of deliberating about damages.
>
> MR. COOPER: Okay.

(Tr. 648).

There was no objection to the court's decision to rule on the matter in this manner. In fact, the complete record establishes agreement with the court's decision to determine the issue whether factual or legal.

If the issue is a fact question, then it has been waived by the Petitioners' position at trial and by the failure to request a jury instruction. If it is a legal issue, National Union is attempting now to controvert the court's legal rulings which are based on the court's determination of underlying facts and therefore comes too late.

The evidence offered at trial does not support Petitioners' arguments that the District Court's determination was arbitrary and capricious. The evidence concerning policy limits is consistent with only one interpretation — a reduction in limits from $3,000,000 to $500,000 was delayed, past the date of the accident, for the extra 23 days it took to get an excess policy in place. The only reasonable explanation of two endorsements lowering limits on two different dates is a change to coincide with the inception of the excess policy on July 1, 1985. It is obvious that the original intent was to have the excess policy in place as of

the date of the first endorsement, and to lower the primary limits at that time. However, when it required three more weeks to get the excess policy, the reduction in primary limits was also delayed for the same time period.

National Union offers no explanation for the second endorsement which effectively delayed the effect of the reduction in limits until after the accident. Petitioners only argue that the second endorsement, admittedly issued by the broker, and admitted into evidence without objection, should be ignored because it was unsigned. Highlands' expert Mr. Sidney Davis testified that the absence of a signature on the copy of an endorsement in the broker's file is not significant, since it is sometimes a practice in the insurance industry to sign only the copy of the endorsement sent to the insured. There is no dispute the second endorsement was issued by National Union and National Union offered no satisfactory reason for avoiding this contractual obligation.

Therefore, as the District Court found, the only logical interpretation of this series of events and contracts supports a finding that policy limits were $3,000,000 on the date of the accident. The first rule of contract construction is to read the language in such a way as to give effect to all the provisions of the contract. *Bretton v. Mutual of Omaha Insurance Company,* 492 N.Y.S. 2d 760, 763 (N.Y. Sup. 1985); *Facet Industries, Inc. v. Wright,* 465 N.Y.S. 2d 941, 943 (N.Y. Sup. 1983); and *Little v. Blue Cross of Western New York, Inc.,* 424 N.Y.S. 2d 553, 555 (N.Y. Sup. 1980). The only reasonable interpretation of the two endorsements is to conclude that the first was intended to reduce the limits on June 7, 1985, but that when difficulties and delays were encountered in obtaining an excess policy, the reduction in limits was delayed until July 1, 1985.

A second rule of contract construction is to give effect to the intent of the parties. *Payroll Express Corporation v. Aetna Casualty and Surety Company,* 659 F.2d 285, 291 (2nd Cir. 1981); and *J.G.A. Construction Corporation v. Charter Oak Fire Insurance Company, et al.,* 414 N.Y.S. 2d 385, 387 (N.Y. App. 1979). Clearly, the intent of the parties, as expressed in Naclerio's construction contract with the City of New York, was to have $3,000,000 in insurance at all times.

If the parties' intent is unclear, the next rule of insurance contract construction is to find in favor of maximum coverage. (*J.G.A. Construction, supra* at 387). Maximum coverage would be the $3,000,000 in limits.

Public policy considerations also govern the interpretation of the applicable policies and endorsements in this case. Public policy in New York prohibits an agreement to retroactively reduce insurance coverage after an accident has already happened. *Ingrassia v. Medical Malpractice Association,* 555 N.Y.S. 2d 876 (N.Y. App. 1990). *See also, Green v. J.C. Penney Automobile Insurance Company, Inc.,* 722 F.2d 330 (7th Cir. 1983) and *Dunn v. Safeco Insurance Company of America,* 798 P.2d 955 (Kan. App. 1990). The District Court therefore correctly rejected Petitioners' construction of the relevant events that there was a reduction in policy limits *after* the accident occurred. Such a retroactive reduction in policy limits and insurance coverage would be void on the grounds of public policy.

Construing this contract, in accordance with the rules of construction, leads to only one conclusion — policy limits were $3,000,000 on the date of the accident. Claiming a 23 day gap in coverage is not only contrary to the rules of construction, contrary to the intent of the parties, and void on public policy, it is contrary to common sense.

The Fifth Circuit carefully followed the standards of New York precedent and basic appellate procedure enunciated by other United States courts of appeal and this Court in rendering its decision. There is no error in the court's opinion and certainly no error substantial enough to invoke the jurisdiction of this Court.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioners' request for a Writ of Certiorari should be denied.

Respectfully submitted,

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